

Letter of Findings Number: 04-20120701
Sales Tax
For Tax Years 2009-11

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ISSUE

I. Sales Tax—Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-7; IC § 6-2.5-4-1; IC § 6-2.5-5-8; IC § 6-2.5-6-2; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4.

Taxpayer protests the calculation of sales tax liability.

STATEMENT OF FACTS

Taxpayer is an Indiana business. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the correct amount of sales tax for the tax years 2009, 2010, and 2011. The Department therefore issued proposed assessments for sales tax, penalty, and interest for those years. Taxpayer protests that the Department's calculations of sales tax due were incorrect. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Imposition.

DISCUSSION

Taxpayer protests the Department's calculations of sales tax due for the tax years 2009, 2010, and 2011. The Department based its calculations on Taxpayer's records. Taxpayer protests that those records were in a system which incorrectly recorded sales as taxable or exempt in some categories of sales. Taxpayer provided alternate calculations and an alternate explanation of its records. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

The Department also refers to IC § 6-2.5-4-1, which states in relevant part:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired;
 - (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.

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Next, IC § 6-2.5-9-3 provides:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in [IC 6-2.5-3-2](#)) to the department; holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

(Emphasis added).

Also, IC § 6-8.1-5-4(a) provides:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks.

Therefore, a retail merchant is required to collect and remit sales tax to the Department and is liable for any

uncollected and/or unremitted sales tax. Also, a retail merchant is required to keep records which the Department may review for sales tax compliance purposes.

Taxpayer protests that the Department reviewed records that did not accurately record the taxable status of some items of tangible personal property which Taxpayer sold. Taxpayer states that it incorrectly set up its record-keeping system and that the resulting review by the Department overstated taxable sales. In the course of the protest process, Taxpayer provided documentation in support of its position that a portion of the sales listed as taxable in its record-keeping system were actually exempt sales such as sales to out-of-state customers and sales to resellers.

Regarding sales to resellers, the Department refers to [IC 6-2.5-5-8](#), which states:

(a) As used in this section, "new motor vehicle" has the meaning set forth in [IC 9-13-2-111](#).

(b) Transactions involving tangible personal property other than a new motor vehicle are exempt from the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property.

(c) The following transactions involving a new motor vehicle are exempt from the state gross retail tax:

(1) A transaction in which a person that has a franchise in effect at the time of the transaction for the vehicle trade name, trade or service mark, or related characteristics acquires a new motor vehicle for resale, rental, or leasing in the ordinary course of the person's business.

(Emphasis added).

Next, the Department refers to IC § 6-2.5-3-7, which states:

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.

(Emphasis added).

Therefore, a retail merchant is not required to collect and remit sales tax on sales to resellers if the retail merchant receives exemption certificates from their customers, as provided by IC § 6-2.5-3-7. Taxpayer states that its record-keeping system was set up incorrectly and the Department's audit relied on inaccurate listings of taxable and non-taxable sales. In the course of the protest process, Taxpayer provided revised sales listings and summaries of taxable and non-taxable sales. Taxpayer believes that these revised records establish that a higher proportion of its sales were to resellers and that the Department's calculations of sales tax which should have been collected should be recalculated based on the revised records.

The Department notes that Taxpayer has not provided any additional exemption certificates in the protest process. While additional sales are listed as having been made to resellers, Taxpayer was required to obtain exemption certificates from anyone claiming an exemption from sales tax. The Department agrees with Taxpayer's statement that resellers are allowed exemption from sales tax as provided by IC § 6-2.5-5-8(b). However, without exemption certificates to verify exempt sales, the Department cannot make any adjustments on this issue. Taxpayer has not met the burden of proving this portion of the proposed assessments wrong, as required by IC § 6-8.1-5-1(c).

Next, Taxpayer states that it operates on an accrual basis and that it reports its Federal and Indiana income tax on an accrual basis. Taxpayer protests that the Department's calculations of sales tax due from Taxpayer as a retail merchant were based on the assumption that Taxpayer reported on the cash basis. IC § 6-2.5-6-2 states:

A retail merchant may, without prior departmental approval, report and pay his state gross retail and use taxes on an accrual basis, if he uses the accrual basis to pay and report the adjusted gross income tax or the tax imposed on him in place of the adjusted gross income tax. The department may, at any time, require the retail merchant to stop using the accrual basis.

Taxpayer states that the differences between the cash system and the accrual system can cause discrepancies in an audit result. While Taxpayer has raised the issue that it reports on the accrual basis, Taxpayer has not provided any analysis or documentation to show what difference it would make if the Department recalculated the amount of sales tax which should have been collected and remitted based on Taxpayer's use of the accrual reporting system. Therefore, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

Next, Taxpayer states that it purchased items at retail which it then sold at retail. Taxpayer protests that it paid sales tax at the point of purchase on items which should have been exempt under IC § 6-2.5-5-8(b). Taxpayer provided a listing of purchases which it states were taxed at the point of purchase but which were later sold at retail. Taxpayer protests that these items, totaling \$1,127.90 in tax paid at the point of purchase, should be exempt and that it should receive credit for sales tax already paid.

In its audit report, the Department recognized that Taxpayer had purchased some items at retail and then resold those items in retail transactions. Taxpayer was unable to provide documentation to establish which items upon which it paid sales tax were then resold in a retail transaction. The Department therefore gave Taxpayer a

fifty percent credit for items listed under this category. While Taxpayer has now provided another list of items which it believes qualify for the exemption found under IC § 6-2.5-5-8(b), Taxpayer has not established that these items are not included in the fifty percent exemption to which the Department has already agreed. Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c).

In conclusion, the Department used Taxpayer's records in its calculations and Taxpayer has not proven those calculations wrong. Taxpayer states that it incorrectly recorded taxable and non-taxable sales in its records but that the records it provided in the course of the protest are accurate. The Department is not convinced that the newly provided records are superior to the records Taxpayer provided during the audit. Taxpayer has not provided exemption certificates to establish that there were more exempt sales than reported in Taxpayer's initially provided records. Taxpayer has not established that the use of the accrual or cash system would result in a different outcome in the Department's calculations. Taxpayer has not established that the retail purchases it made of tangible personal property for resale were not already included in the fifty percent credit allowed for such purchases in the audit. Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c) regarding its protest of the Department's calculations of sales tax which should have been collected and remitted by Taxpayer.

FINDING

Taxpayer's protest is denied.

Posted: 09/25/2013 by Legislative Services Agency
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